



Paper No. 11

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APR 08 2003

In re Application of
Hanson
Application No. 09/755,702
Filed: January 5, 2001
Attorney Docket No. P-1015-27

**OFFICE OF PETITIONS
ON PETITION**

This is a decision on the petition under 37 CFR 1.137(a), filed March 10, 2003, to revive the above-identified application. In the alternative, petitioner requests consideration under 37 CFR 1.137(b).

The petition under 37 CFR 1.137(a) is **DISMISSED**.

The petition under 37 CFR 1.137(b) is **GRANTED**.

The above-identified application became abandoned for failure to timely reply to the Restriction Requirement, mailed July 31, 2001, which set an extendable 1 month period for reply. Petitioner filed an election, a \$55.00 check for a one month extension of time, and authorization to charge petitioner's deposit account for any required fees on November 28, 2001. A three month extension of time fee costed \$460.00. Thus, petitioner owed \$460 - \$55 = 405. Petitioner's deposit account did not contain enough funds to pay the balance due. Thus, the application became abandoned on October 1, 2001, as was pointed out in the Notice of Abandonment, mailed March 12, 2002.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by (1) the required reply; unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof; (2) the petition fee as set forth in § 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer (and fee as set forth in § 1.20 (d)) required pursuant to paragraph (c) of this section. This petition does not satisfy requirement (3).

Regarding (3), the showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a). Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

The Commissioner may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable". 35 USC § 133. Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term 'unavoidable' "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

In the instant case, petitioner has failed to provide adequate evidence that the delay was unavoidable. An adequate showing of diligence in prosecution is the touchstone of a successful petition to revive under an unavoidable standard. As stated above, petitioner's deposit account did not have sufficient funds to cover the \$405 balance owed to the Office. A review of Office financial records indicates that the closing balance for petitioner's deposit account in November 2001 was \$135. The closing balance for petitioner's deposit account in December 2001 was \$10.00. The Office informed petitioner that there was an insufficient deposit account balance to charge the required fee on January 28, 2002. The Office did not receive further written communications regarding a request for an extension of time.

Petitioner did not meet his responsibility to monitor and maintain his deposit account. It was petitioner's responsibility to ensure that an adequate amount of money was present in the deposit account to pay patent related bills. Petitioner did not fulfill this responsibility.

The Office informed petitioner that there was an insufficient deposit account balance to charge the required fee on January 28, 2002. The Office did not receive further written communications regarding a request for an extension of time. Had petitioner proved that on February 28, 2002 petitioner again applied for an extension of time, as petitioner alleges in the instant petition, petitioner would have been charged \$925.00 and the application would not have been abandoned. However, petitioner has not proved that an extension of time was filed on February 28, 2002. Thus, petitioner's deposit account will be charged the \$650 petition fee for filing a petition under 37 CFR 1.137(b).

The petition under 37 CFR 1.137(a) is **DISMISSED**.

The petition under 37 CFR 1.137(b) is **GRANTED**.

The statement of unintentional delay presented in the petition does not comply with the current rule. 37 CFR 1.137(b)(3) requires a statement that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional" be submitted. However, the statement presented will be accepted and construed as meaning that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional." If this is an incorrect interpretation in view of the rules, petitioner is required to provide a statement to that effect.

The application will be returned to Technology Center 3700.

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Telephone inquiries concerning this decision should be directed to the undersigned at (703) 308-6712.

A handwritten signature in black ink, appearing to read "E. Shirene Willis". The signature is written in a cursive, flowing style.

E. Shirene Willis
Senior Petitions Attorney
Office of Petitions